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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 11.

CENTRAL KENTUCKY NATURAL GAS CO., *Appellant*,

v.

RAILROAD COMMISSION OF KENTUCKY, ET AL., *Appellee*.

REPLY BRIEF FOR MOVANTS.

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May It Please The Court:

Appellant today filed its objections to the motion to dismiss appeal. It presents four points or suggestions. As applied to this case they are unsound or not applicable.

(1) Citations are regularly signed by lower courts in regularly taken appeals. The records being still under its control and jurisdiction the statutes provides for such signing. The rule is otherwise after the record is removed by appeal.

Sipperly et al. v. Smith et al., 155 U. S. 86.
P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45.
United States v. Hooe et al., 1 Cranch C. C. 114.
(Affirmed 7 U. S. 73.)

(2) Movants were admitted as parties before the Rail road Commission and in the District Court standing in the record as made before the Commission.

This gave them all the rights of original parties.

The rule is stated at Section 2670 Cyc. Fed. Procedure, as follows:

> "Persons who have been allowed to intervene in a suit become parties thereto with all the rights and privileges which attach to the relation including that of prosecuting an appeal from the judgment or decree which affects their legal interests." (Cases fully cited.)

Zoline Fed. Appellate Procedure, Section 158, says:

> "Parties who were allowed to intervene may appeal." Ex parte Jordan 94; U. S. 248; 24 L. Ed. 123.

Sipperly et al. v. Smith et al., 155 U. S. 86, *supra*, presents a case where an intervener appealed without joining other parties to the suit. The appeal was dismissed.

(3) The position taken by appellant in this instance is out of harmony with its position on May 9th.

Then it said movants were not parties to the proceedings either before the Commission or in the District Court. Now it takes the position that its petition for appeal and order allowing same is all inclusive and includes movants This because the suit in the District named S. B. Feather stone "as representing all other persons similarly situated."

The parties to an appeal must be impleaded by name. General classifications and designations are not sufficient.

If the names are not in the record it cannot be amended to include them in a citation.

Estis v. Trabue, 128 U. S. 225-230, this Court said:

> "This Court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm, or which designates some of the parties by the

expression '& Co.' or the expression 'and others' or in any other way than by their individual names."
Writ of error in the name of "Heirs of Nicholas Wilson" will be dismissed, as no person is named.
Wilson v. Insurance Co., 12 Pet. 140, 9 L. Ed. 1032.

A writ of error which describes parties by a firm name will be dismissed.

Godbe vs. Tootle, 154 U. S. 576, 14 S. Ct. 1167, 19 L. Ed. 831.

A writ of error which refers to parties "and others" is defective and should be dismissed.

Miller vs. McKinzie, 10 Wall. 582, 19 L. Ed. 1043.
Smyth v. Strader, 12 How. 327, 13 L. Ed. 1008.
Deneale vs. Archer, 8 Pet. 526, 8 L. Ed. 1032.

(4) A belated citation to a valid appeal is one thing, but a citation to a Court where there is no appeal, presents an entirely different aspect. Appellant now admits by its third point that its only chance to hold movants in its case is by claiming that they were brought in under the expression all other persons used in connection with S. B. Featherstone.

That it cannot do this is shown by the cases cited under section (3) hereof. When the Rail Road Commission and the District Court admitted movants as parties the aforesaid Featherstone no longer represented them. They represented themselves. General or class representation yields to personal and actual representation.

The order of this Court entered on May 9, 1933, declared that these movants were *not parties to the appeal*, and for that reason their application for leave to appear specially for purposes of moving to dismiss the appeal, and for leave to present such motion, was denied. Further, in that order it was declared that "On examination of the papers sub-

mitted by the applicants, and in view of the provision of the decree under review with respect to the distribution of the impounded funds the Court is of the opinion that the applicants *should be made parties to the appeal, and in order that proceedings for that purpose may be taken the hearing of the cause is postponed and the cause is assigned for oral argument on October 9, 1933.*"

Thus the Court in its order held that movants were not, when the order was entered, parties to the appeal, but that they should be made such parties if the appeal was to have effective standing before the Court. We would urge that the order did not undertake to declare that the appeal could be so perfected; but that it intended no more than that the appeal must be perfected as to movants, if the law, the decisions, and the state of the record would permit movants to be brought in as appellants before October 9, 1933. We urge that the law, the decisions, and the state of the record since that order was entered have not permitted the movants to be actually brought into the case as appellees; and certainly appellant has taken no proper step to bring them.

Appellant made not application to this Court to procure an order making appellees the movants. Only this Court would have jurisdiction to make such an order, and even this Court could not, as we believe, make such an order except in direct contradiction of its well established precedents and procedure.

The state of the printed record does not disclose the movants as parties therein and thereto; hence even this Court cannot now make them appellees.

On July 11th, 1933, appellant served the notice found on page 15 of its brief. Counsel was familiar with Section 3, Rule 12. It relates to procedure between parties to an appeal.

Upon receiving this notice counsel for movants ascertained from the office of the clerk of this Court that no application had been made for an order making movants

parties, and that their status was the same as on May 9th when this Court declared them not to be parties.

In these circumstances it was deemed the better procedure to do nothing that might constitute a general appearance. Proceeding under Section 3, Rule 12, would have constituted an appearance in the case.

The movants very naturally desire to protect their interests in this vital rate controversy, and wish to avail themselves of every appropriate means of defence. They have believed that nothing that has been done by the appellant has perfected the appeal as to themselves; and they have realized that the appellant, through its deliberately planned strategy, sought upon this appeal, to ignore, completely, the movants and the thousand of other gas consumers associated with them, and undertook to keep from this court any knowledge or information touching the fight made by the movants and their associates before the Railroad Commission and the lower court. Hence they have felt that they were under no obligation to aid the appellant in perfecting the appeal. They entered into no agreement about the omitted record, because any such agreement might have entered their appearance upon the appeal. They have not conceived it to be their duty to aid the appellant in curing a situation which the appellant in a most arbitrary, unfair, unjust, and sinister spirit—as movants have regarded it—brought about. If the appellant, in its effort to win the appeal had kept from the court the full record; had failed to bring in the movants as parties to the appeal; had waited too long to permit an amendment of the appeal by their inclusion as appellees,—why should the movants surrender this advantage to themselves which had come about solely through the unusual and selfish course pursued by the appellant? If it may have developed that appellant has been hoist by its own petard, why should movants perform the work of unhoisting?

Therefore, the movants took no action in regard to the citation recently served on them; they have entered into no agreement with appellant as to the omitted record. There has been no severance of them below and this court has held that they are necessary parties to the appeal; necessary if the appeal is to be maintained. No bond for costs to them has been executed; this court has made no order making them appellees. Why should they, in the light of this situation, surrender their rights, and of their own volition, make themselves appellees? Had the appellant included them as original appellees, the entire record would have been before the court when the case was called for argument last May, and the appeal would have been then disposed of.

If, however, the theory of the case held by movants should be deemed by the court erroneous; if the court should enter an order making or declaring them appellees,—then, they would respectfully submit, the appeal cannot be properly heard or considered unless or until the omitted record is supplied; and the ends of justice will require further continuance of this appeal.

Appellant today filed the affidavit of Mr. Tonkin made at Lexington October 4th. Shortness of time prevents an answer to its contents further than to say that except in a few minor statements it is uncandid and partly untruthful. It is within the knowledge of the Lexington counsel that Mrs. Hollinger, Mrs. Berkly and Mrs. Taylor and Mr. Delph are gas consumers and have been such at all times during this controversy. If permitted their affidavits and bills will be filed.

The court is told by the affidavit that the city employed Judge Winn, an outstanding member of the Bar in December, 1926, and that thereafter all the gas consumers were satisfied, etc., when in point of fact that distinguished jurist was employed as early as January, 1926. All the preceding events mentioned by movants in their affidavit on page 23 took place after he came into the case.

It is respectfully submitted that the motion to dismiss should prevail. There is a defect of parties. The defect cannot, is not subject to correction under Section 873 U. S. C. A. The records submitted disclose that many parties other than movants were parties in the Railroad Commission, that none of these parties were joined in suit in the District Court. Such parties will not be bound by the action of this Court as they are not before it.

If, however, the Court does not dismiss the appeal, it would seem to be proper to so phrase the mandate as not to affect the rights of parties not before it to enforce their rights against the Gas Company in the various litigations referred to in sections 31-32 and 33 of the affidavit on page 27 of movants' motion to dismiss filed herein.

Respectfully submitted,

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